MYKOLAS ROMERIS UNIVERSITY

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PROTECTION OF THE WITNESS'S PROCEDURAL INTERESTS IN CRIMINAL PROCEDURE: PROBLEMS AND PERSPECTIVES

Summary of Doctoral Dissertation
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PROTECTION OF THE WITNESS'S PROCEDURAL INTERESTS IN CRIMINAL PROCEDURE: PROBLEMS AND PERSPECTIVES

Introduction

The topicality and the problems of the theme. The Constitution of the Republic of Lithuania protects and defends rights and interests of a person. Its mission has to be implemented without any discrimination not allowing any conditions that may reason appearance of social separation. This is also specified in the Criminal Procedure Code (hereinafter referred to as the CPC) of the Republic of Lithuania where Article 1 defines the goal of criminal procedure related to protection of interests of a person or a citizen within the time of procedural activity. Therefore while investigating and analyzing criminal acts the persons involved into the procedure who have one or another interest in this procedure should not be forgotten or ignored. The witness belongs namely to this circle of persons and appears together with the circumstances of criminal deeds. Unfortunately, both in theory and in practice legal status and role of this subject have often been not only depreciated but simply unintentionally forgotten. As a rule it is considered that the role of the witness commences and ends with giving testimony during the stages of pre-trial investigation, trial examination, etc. Besides, quite often it is affirmed that this subject of the procedure has no interest in the case whatsoever, his/her role is fragmentary, subsidiary. Finally, the mission of this subject in general is usually put into the background not realizing that in numerous cases the witness's evidence is extremely significant or even decisive.

The question of protection and assurance of the witness's procedural interests in criminal procedure is vital for the sole, although especially significant reason – if during procedural activity the witness's procedural interests are not protected, if the needs of this subject, as a person, are neglected that are usually associated with safe existence, striving to avoid uncertainty, the wish to be needed and cared for, then one should forget about genuine assistance of the witness while implementing the goal of criminal procedure. It is necessary to understand that the state which does not distinguish the question of protection of interests of the witness, who helps to establish the truth in the case, as a question of priority, jeopardizes itself that the criminal procedure concerning definite criminal acts may not reach summit of justice.

The object of the study – the witness's legal position in criminal procedure, historical development of the witness's institution, his legal nature, other questions of procedural status. The theme of protection of the witness's procedural interests, which enhances the questions of the purpose of protection, the system of protection and the mechanism of protection measures, is important as well. The construction of the object of the study determines the direction of this study

– i.e. first of all, the analysis of theoretical basis of the witness‘s legal position in criminal procedure and second, the analysis of protection of the witness‘s procedural interests.

The aim of the study – to examine in a complex way theoretical basis of the witness's legal status in criminal procedure that influence protection of procedural interests of this subject, conception of such protection, evaluate to what extent and how are these questions reflected in the CPC as well as provisions of other legal acts and judicial practice, also to establish drawbacks of legal regulation and practical implementation of legal norms, propose ways of elimination of the drawbacks identified and optimization of other provisions.

The tasks of the study. The tasks induced in order to achieve the aim of the study:

1. Discuss historical evolution aspects of the institution of the witness in criminal procedure of Lithuania which show the formation of legal nature of the witness and conception in different historical periods, change of attitude towards the witness as a procedure subject and as a person, how significant was the role of the witness in different periods depending on social, economic, political and, of course, legal factors.

2. Examine procedural status of the witness, the moments of commencement and end of this status, their influence on proper protection of the witness's interests as well as criteria and conditions for becoming a witness.

3. Reveal and discuss the contents of social-legal role of the witness which enhances function and interest of the witness, discuss their influence on the assurance of legal status of the witness in criminal procedure.

4. Discuss the conception of the purpose of procedural interests' protection of the witness, system and mechanism of protection measures, analyze advantages of implementation of this protection and establish drawbacks.

5. Establish difficulties and limitations of legal regulation and practical implementation of additional guarantees (immunities) as some of the rights of the witness within the scope of protection measures of procedural interests of the witness, define possibilities and ways of elimination of these difficulties and drawbacks.

6. Establish weak points of legal regulation and practical implementation of measures of special legal protection of the witness's interests, search, disclose and define the reasons of these weaknesses, propose ways of optimization and improvement.

Novelty of the work. Nowadays in law theory and, undoubtedly, practice of criminal procedure lack of scientific research of some questions is felt. It is noteworthy that there are no concrete, independent scientific investigations carried out in Lithuania devoted to the witness's protection analysis. Despite the fact that for today some scientific publications on this issue exist, there have been no deeper and more thorough examination performed up to now. Actually we

cannot forget that separate researches or practical literature analyze issues of the witness's protection in a fragmentary way but they are either insufficient to solve theoretical and practical problems properly or some aspects under analysis are no longer as vital as they had been before or simply the existent judicial practice in respect of these issues has not been generalized, there is a lack of theoretical position which could overwhelm practical attitudes. Looking upon judicial experience while dealing with these questions it is noteworthy to emphasize that although in separate court decisions questions on conceptions of the witness are dealt with, as well as assurance of legal status of the witness, his/her relation with other participants of procedural activity, it is still insufficient to disclose thoroughly the essence of protection of procedural interests of the witness and mechanism of protection measures in Lithuania.

The novelty of the research is also reasoned by, first of all, the fact that the conception of the witness is being disclosed perhaps for the first time taking into consideration the tendencies of its historical evolution starting with the law epoch of Grand Duchy of Lithuania and ending with contemporary law, construing new attitude towards who can be and who is the witness, what is the witness's social-legal nature, the purpose, what are the features typical of the witness, what is the authenticity and indispensability of the witness, the witness's interest in the case. Secondly, the research examines in depth the need for procedural interests' protection of the witness, seeks for an effective protection model (mechanism) and possibilities taking into consideration contemporary circumstances, separate and special measures of legal protection comprising this mechanism.

Practical importance of the work. Significance of investigation carried out in the doctoral thesis is directly linked to the topicality of the work. Therefore the work is significant because of several reasons. First, the investigation and its results are important for formation of depository of criminal procedure science. The analysis performed in the investigation, statements formulated, conclusions and proposals essentially contribute to the formation of conception of separate legal institutions of criminal procedure, evolution of other objects of investigation of law sciences, creation of conception of protection of the person's rights and its doctrine in Lithuania and, finally, true realization, evaluation and application of provisions of legal acts and judicial practice. Second, this investigation helps to realize that relationship between the person and the state, - in whatever legal process or its stage - has to be based on non declarative but genuine and vital assistance to each other, interchange of social and legal values rather than forcing and requiring the person (subject of the procedure) to fulfill his/her duties neglecting constitutional interests of the person. And third, the results of the investigation are essential for practical activities of legal institutions in their application and implementation of the CPC and provisions of other legal acts, for explaining real nature and the essence of these clauses, mastering not only Lithuanian but also international (European Human Rights Court, Court of Justice of European Communities) judicial practice and

for its application. Besides, the results of the research will enable practical employees of legal institutions to compare Lithuanian legal base with the one in foreign countries in respect of issues of conception of the witness and protection of the witness's interests, judicial practice and, based on that, make appropriate effective decisions.

The hypothesis of the study. The measures of protection of the witness's interests as foreseen in the CPC and other legal acts are not sufficient for their implementation. Practical application of the existent measures of protection sometimes prove to be ineffective too.

The carried out study and the formulated conclusions substantiate the following statements:

1. A person gains the procedural status of the witness from the moment when he/she becomes aware of his/her, as a witness's, rights, duties and responsibility.

2. Interrogation of other subjects of the procedure (the victim, statutory representative, official who performed pre-trial investigation or separate actions of it) in the same case, as witnesses, thus twinning, in principle, different procedural roles, does not correspond to legal nature of the witness.

3. The function of the witness in criminal procedure – help to establish the truth in the case. The witness's role in the procedure is not subsidiary.

4. In criminal procedure the witness usually shows interest (to at least his/her legal position), only the character of interest is different.

5. Legislative regulation of protection of some interests of the witness is not appropriate. The CPC should directly empower the right of the witness to be informed about his/her rights and duties, right to legal assistance, right to appeal against certain actions performed by subjects who carry out the procedure as well as their decisions, the right to raise an objection to the interpreter.

6. The model of absolute anonymity of the witness as established by the CPC is not sufficient for proper protection of the witness's interests. Relative (limited) anonymity is also indispensable.

7. Some additional guarantees (immunities) of assurance of procedural interests of the witness are not appropriately defined in legislation what sometimes reasons their unfair practical implementation.

8. Special legal protection of the witness would become more effective in case protection measures of the witness were fortified and socially oriented in legislation.

The main sources of the study. The main sources of the study are as follows: Lithuanian and foreign states' (Armenia, Bulgaria, Bosnia and Hercegovina, Czech Republic, Estonia, Italy, India, Montenegro, the United States of America, Kazakhstan, Latvia, Macedonia, Norway, France, Russia, Finland, Sweden, Thailand, Germany) criminal procedure laws (codes) and other special

laws, which regulate the implementation of the witness‘s protection; practice of Lithuanian, European Human Rights Court, Court of Justice of European Communities and other foreign states’ courts, legal acts of European Union, international treaties and recommendations, literature pertaining to legal theory, criminal procedure, criminal law, criminalistics, civil law, civil procedure, psychology and criminological sciences, statistical data.

Methods of the study. To examine the object of the thesis investigation and to prove the statements several theoretical research methods and one empirical method were used.

One of the methods that was most widely used – *systematic analysis*. An exceptional significance of this method was reasoned by investigation objectives, the fulfillment of which allowed formation of comprehensive, generalized view on the investigated object. It enabled to explain and examine the contents of the witness’s procedural status and social-legal role, also to identify specific features of the witness, to determine the place of the witness in the system of other procedural subjects, the essence of the measures of protection of the witness’s interests and implementation mechanism of these measures within general context of protection of human rights and interests.

Method of *abstraction* in the investigation allowed to distinguish features typical of the witness. With regard to general and essential features of the persons who saw, heard or otherwise perceived circumstances of the incident the investigation forms general conception of “an ideal witness” which is specified as “transparent” conception of the witness. Whereas with the help of *generalization* method it was possible to tell general statements or tendencies defining the importance of the witness in criminal procedure, purposefulness of procedural rights and additional guarantees of the subject, principles of improvement of their regulation and implementation.

Genetic and comparative historical methods allowed examination of historical development of the witness’s institution, its conception during different periods. These methods allowed not only to define the essence and role of the witness starting with the law of Grand Duchy of Lithuania but also to compare social, legal and political conditions within different periods that influenced the formation of the institution under question.

With the help of *comparative* method provisions of legislation of criminal procedure of Lithuania and other foreign states were compared insofar as it concerns the conception of the witness and protection of interests of these subjects. Also statements and arguments dealing with problems under question of different authors and groups of authors were compared.

Establishment and generalization of social facts and events, observation of facts and their recording (empirical investigation) in this research based itself on *documentary analysis* method. The investigation did not refer to quantitative indices of analysis of judicial practice. On the contrary, the aim was to perform a qualitative investigation of judicial practice. The jurisprudence

of The Constitutional Court of the Republic of Lithuania of 1996-2006 was reviewed which best illustrates problematic sides of the questions investigated in the thesis. Besides, while analyzing certain questions civil and criminal cases of The Supreme Court of Lithuania of 1999-2008, The Appeals Court of Lithuania of 2004-2007 were also reviewed and the decisions taken with regard to those cases (rulings, judgments) as well as criminal suits of Vilnius and Siauliai district courts of 2006 and the decisions taken in administrative cases of The Supreme Administrative Court of Lithuania of 2006. Documentary analysis also allowed examination of jurisprudence of European Human Rights Court of 1970-2006 and Court of Justice of European Communities of 1989-2007. The cases examined by legal institutions not only in Lithuania but also in foreign states (Poland, Russia, the United States of America) were analyzed what enabled to compare how the solutions of the problems associated with the object of the thesis investigation are dealt with abroad.

Approbation of the results of the study. The results of the study were approbated at the sitting of the Department of Criminal Procedure of Law Faculty of Mykolas Romeris University. Respectively the results of the study are used while delivering lectures to law students of Law Faculty, Faculty of Strategic Management and Policy and Faculty of Public Administration of Mykolas Romeris University. The abovementioned results are used by giving remarks and suggestions to legislator, other state institutions, which form criminal policy in the Republic of Lithuania as well.

Structure of the work. Structure and totality of the work are predestined by the object of investigation, the objective defined and the tasks raised to attain the objective, investigation hypothesis and statements of the thesis under defence that give purposefulness to the work. The investigation of the thesis is composed of introduction, overview of the investigation, methodology of the research, two main- investigative parts, conclusions, proposals, references and annex.

In the introduction of the dissertation the issue under research and the problems of the theme are introduced, topicality of the theme of work, novelty of the work and the aim of the study are defined and the tasks induced for this purpose. Hypothesis of the study as well as defended statements are also carried out in the thesis.

The first part analyses the background of the witness's legal status in criminal procedure including issues of historical evolution of the witness's institution in criminal procedure of Lithuania and the questions of the contents of legal status itself. Overview of historical evolution of the witness's institution in criminal procedure of Lithuania is the first step introducing into the topicality of the investigation. The overview of this evolution overwhelmes the aspects of development of the witness's institution in criminal procedure during law epoch of Grand Duchy of Lithuania, period of loss of statehood until the end of the 20th century, periods of inter-war and soviet regime as well as after restoration of independence of Lithuania. The results of the overview

of this institution within the framework of historical development of Lithuanian law help us to get more deeply into and consistently into the analysis of the witness's legal status in contemporary criminal procedure, to disclose the nature of the witness's conception and the witness's role in legal procedure. The first part also deals with such vital questions as procedural status of the witness, the witness's function in the procedure and the witness's interests.

The issues of the witness's procedural status are related to the moments of its commencement and end, their importance for protection of the witness's procedural interests. The appearance of procedural status is always associated with factual and legal background as well as with the essence of procedural subjectivity. It is stated that any person may be called as a witness about whom there is information that he/she may know any circumstances whatsoever that may be significant for resolving the case and may not necessarily be aware of the importance of the circumstances known to him/her and their significance for the purpose of criminal procedure. Exactness of the moments of beginning and the end of the witness's procedural status is extremely important for proper solution of the assurance of the witness's legal status in criminal procedure. It is important to know that it will depend namely on the state's point of view towards a human being if a person being factual (non procedural) witness later on becomes an official (procedural) witness in a criminal suit. In case the state ignores the question of protection of the procedure subjects then respectively the persons who saw, heard or otherwise observed (perceived) the circumstances of criminal deeds and in such a way became factual witnesses will have no wish to assist public institutions in revealing criminal acts and identifying the persons who performed them.

The thesis allows that the problem of permitting some procedure subjects to become witnesses is urgent not only in theory but also in practice. Proper realization of the witness's legal position allows not only to purify the witness's social-legal role but also to separate "independent" witness from the witness associated with the outcome of the suit. In such a way it is the intention to avoid situations when one and the same person in the same case and at the same time acquires double procedural status. The contents of these positions is in fact different and cannot be identified in one person at the same time and in the same case. The main criterion allowing separation of the witness from other procedure subjects who perform one or another function in the same case is the interest. Differently than the witness, the victim in a criminal suit will always be interested in the outcome of the case. Also the statutory representative representing the interests of the other person and in such a way helping the represented to defend his/her interests is also interested from the point of view of the other person. The official of pre-trial investigation who performs pre-trial investigation or definite actions of it in fact fulfills criminal persecution function that is why he/she cannot be interrogated as a witness in the same case. It goes that interrogation of the victim, the

statutory representative or the official who performed pre-trial investigation or certain actions of it has to be carried out not like the witness's but observing the rules of the witness's interrogation.

Implementation of the witness's rights and duties directly reasons legal determination of the witness's function-role. Totality of the witness's rights and duties is considered to be not only supportive instrumentation of the witness's role but at the same time attributes to the witness's function value-based direction, place and goals to achieve. Whereas determination of the goals to be achieved already itself defines the direction of function-role, its meaning. Purposefulness of the witness's function shows its aim as a specific intention with the help of the testimony to assist on his/her own will and sincerely the subjects who carry out criminal procedure and seek to implement the purpose of the procedure. This is assistance in order to establish the truth in a case. While talking about the witness's function which expresses itself in the ability to realize the circumstances of the incident and the duty to render the information in possession to the subjects who carry out the procedure it is necessary to keep in mind that it is being performed in the context of certain exchange with the state. This means that if the state names the protection of the witness's interests as one of the elements of the goal of criminal procedure, it is clear that it acknowledges that the witness not only performs procedural function but also that this function is not kept in the background. On the other hand, the witness while implementing his/her duty to give testimony in change is requiring or may require safe existence. This requirement is in a way a precondition and implementation of it assures not only protection of the witness's person which would lead to his/her active determination to establish the truth but also reliability of the witness's evidence will be guaranteed. Reliability of the witness's testimony is an indispensable condition to avoid unjust or unjustified conviction of a person. The function of the witness in the procedure is to give testimony and in such a way to contribute (help) to determine the truth in a case. Implementation of proper performance of this function (actively and sincerely) not only formally (i.e. to come to give testimony only because it is your duty, it is needed and nothing else) is possible only upon guaranteed security of the witness in the procedure. The witness's aspiration to help sincerely and not only formally legal institutions is reasoned by reciprocal commitment (the witness's and the state's) do ut des on the principle of change. Talking about personification of subsidiary (quite often –technical-organizational) function one should draw attention to the fact that persons who perform this function, i.e. the invited, secretary of the sitting, bail provider etc. are not subject to indispensability requirement in the case. The witness implements authentic function, it cannot be fulfilled by any other subject of the procedure. What is true, that the victim may also help to establish the truth in the case although quite often he/she may be substituted in the procedure. Finally the witness himself/herself is also bound by the character of this function, the witness cannot perform functions that are attributed to other procedure subjects.

The analysis of the witness's interest in the case allows affirmation that the witness's procedural interests in criminal procedure may be divided into those interested in the outcome of the case and the ones interested in their own legal position in a definite criminal suit. Interest in the outcome of the case means that the person's need is associated with the definitive decision in the case. To put it differently, this interest appears when future decision taken by the court or other authorized subject may influence the character of legal relations, the persons' rights and duties. This issue is especially widely analized in civil procedure law and science. The interest in the outcome of the case is usually characterized by two categories – material-legal and procedural-legal interests. Material-legal interests, i.e. social needs, protected by laws without attributing to their holders subjective material rights and granting them the right to refer to judicial or other kind of legal assistance. Whereas procedural-legal interest is an independent legal phenomenon which is satisfied by activities of legal institutions. It means the person's need to commence the procedure and to participate in it. As a rule, the witness is interested in his/her legal position in criminal procedure. Aspiration to protect own procedural rights, to guarantee proper environment to perform the duties defines the witness's legal interest in his/her procedural status. Any hindrance reasoning impossibility to implement the rights or duties or insufficient implementation of them determines the need to seek appearance of secure environment or existence. In such a way the source of appearance of this interest is defined, i.e. procedural relations where the witness participates. Legal interest in procedural status differs from the interest in the outcome of the case in that the witness is not concerned about definitive decision of the case as it does not influence in any way his/her rights and interests (except for the condition foreseen by part 2 of Article 82 of the CPC). In this case secure procedural status is related to the implementation of procedural role of the witness. The witness as any other subject of the procedure is interested in defending Article 81 of the CPC and other rights established in criminal procedure law, or to put it in another way – in requiring possibilities to perform appropriately his/her procedural duties, that legalize the above mentioned procedural rights.

Although in this part purified concept of the witness's features is constructed.

The second part is devoted to examination of general aspects and problematic questions of protection the witness's procedural interests. All this allowed to analyze the contents of protection measures of the witness's procedural rights, the witness's additional guarantees in criminal procedure and topical issues of their implementation. In fact this part is devoted for examining the following issues: what is protection of the witness's procedural interests and what is its contents, what kind of measures for protecting the witness's procedural interests in Lithuania are available and what other measures should be implemented, what are advantages and disadvantages of implementation of these measures of protection?

The mechanism of protection of the witness's procedural interests enhances procedural and special protection measures. Procedural protection measures may be applied only during criminal procedure. This protection includes assurance of the witness's procedural rights, implementation of the witness's additional guarantees (immunities) and implementation of the witness's anonymity. Application of procedural measures may be mixed. Effectiveness of the measures depends on how timely they are, on their complexity and flexibility. Besides, it is noteworthy that the latter protection should not be formalized, because, as it was mentioned before, only the witness who feels support of the state may be in fact useful to the officials of legal institutions who seek implementation of criminal procedure mission.

The witness's procedural rights and guarantees for their assurance as incorporated in the CPC are not sufficient to guarantee proper legal status of the witness. One should draw attention to the fact that for the witness to fulfill his/her obligations properly, i.e. to come and give true testimony, it is necessary for the witness to possess as many procedural rights as to guarantee comprehensive and reliable performance of the witness's role in criminal procedure. It is considered that the circle of procedural rights should be evaluated in the light of quality rather than quantity. Only knowledge of your rights and realization of their essence can assure proper legal status of the witness. Therefore apart from procedural rights nowadays incorporated in the CPC of Lithuania there should be foreseen other rights as well, namely, the right to be informed about the rights and duties you possess, the right to legal assistance, the right of appeal against certain actions and decisions, the right to raise an objection to the interpreter. The right to be informed should be incorporated in the legislature for the reason that informing the witness about his/her procedural rights and duties would not only be a formal and mechanical action of legal officials but it should become clear and genuine explication of the witness's legal position. The right to legal assistance is needed not only for the victim, the suspect, the accused, etc. participating in the procedure. This right in its contents is vital to the witness as well because quite often a person participating in a case and interrogated as a witness, later on becomes the victim in the same case or the suspect, etc. In such a practice it is very important for the witness to defend himself/herself from jeopardy of dishonest procedure in respect of him/her. This happens in cases when legal officials seeking to obtain as explicit evidence as possible ask, for example, questions implying the answer, what is strictly forbidden by the law, etc. The right for appeal against some actions or decisions is needed for the witness to defend his/her procedural rights. Sole possession of the rights and disability to defend them by means of active actions sometimes makes these rights quite declarative and ineffective. The right to raise objection to the interpreter means that while implementing this right the witness may defend himself/herself from the interpreter who performs his/her duties negligently and mistakenly translates testimony of the witness in the case. The interpreter being an intermediary

between the witness and the official who interrogates the witness, it is very important to know that this right allows the witness to fulfill his/her obligations properly in criminal procedure.

Additional guarantees of protection of the witness's procedural interests foreseen in Articles 80 and 82 of the CPC witness the fact that in criminal procedure the witness as a person may not be inquired at any expense, the witness's possibilities to give testimony and his/her will to do so should always be evaluated as well. It means that the law determines appropriate (absolute or relative) limits and their existence mean that because of personal (professional) ties or commitments the witness cannot be obliged to give testimony or the witness may not be subject to interrogation at all concerning certain circumstances in criminal procedure. In the given case the state should create and support the balance between the purpose of criminal procedure, i.e. aspiration to disclose apprehensively criminal deeds, etc., and the person's personal and/or professional interests the protection of which is assured by other laws of the Republic of Lithuania too. These guarantees are called as immunities that forbid establishing the truth at any expense. The role of additional guarantees (immunities) is extremely important in criminal procedure. These immunities help to protect certain personal and professional interests (secrets) of the witness. The essence of the witness's additional guarantees is that these procedural protection measures guarantee some of the witness's personal (family) or objective (professional) secrets' protection. Personal immunities guarantee the right of the person to decide freely whether to give evidence against himself/herself or not as well as implementation of free decision of family members, close relatives or other close people of the suspect or the accused to give evidence against their close person. Whereas professional immunities allow certain people participating in the case as witnesses perform their objective (professional) functions without hindrances.

While talking about the concept of the right to anonymity first of all it should be underlined that this right has to be explained as the right to ask the official who performs pre-trial investigation or the prosecutor to "make" the witness's procedural status unknown, unidentified or to put it in another way – make the witness as "nameless subject" in the procedure. The witness's anonymity may also be called as turning the witness into a secret in a criminal case. The objective of implementation of this right – to ensure secure position of the witness in the procedure what creates preconditions for reliability of the testimony of this subject and what is considered as indispensable condition while trying to avoid unjust or unjustified conviction of a person. Together this would create conditions to carry out justice in a criminal case. Anonymity as a guarantee of security is a procedural-legal measure of the witness's protection related namely to the witness's person only. Anonymity determines unavailability of data of certain subjects of the procedure, i.e. the suspect, the accused, the convicted, the acquitted, their defenders and representatives, the victim and his/her representative and other subjects who do not perform criminal procedure - the witness who

participated, participates or shall participate in the procedure. The analysis of implementation of anonymity of the witness shows that this institution in Lithuanian criminal procedure is not optimal. Now the CPC incorporates the model of absolute anonymity whereas in order to guarantee proper protection of the witness's procedural interests relative anonymity is also indispensable.

Special legal (non procedural) measures should be also attributed to protection measures of the witness's procedural interests. Special legal protection of a witness is assurance of the witness's interests by means of physical, organizational, material and social protection measures that are applicable both during the criminal procedure and after it ends. This concept as it is clear from its structure attests that special legal, i.e. non procedural protection first of all is associated with the whole complex of different security measures that may be applied depending on the need, the prevailing situation and the measures required for the objective to be achieved. Secondly, this protection from the point of view of the limits is associated not only with criminal procedural activity. Its boundaries are much wider, i.e. the moment of implementation of protection is determined not by investigation and examination time of criminal acts but the need to protect a person. It is noteworthy that while implementing this protection the witness as the person to be protected may no longer have legal status of the witness because protection may be started to be implemented and may continue after termination of the criminal procedure. The sole fact that a person to be protected and who is protected was a witness is sufficient. Thirdly, in case procedural protection is related to entire secrecy of the witness (application of anonymity) in the case, then the objective of special legal protection is not only to make the protected person secret. Other measure may also be applied in such a case, not related to physical secrecy (classification) of a person. And fourthly, when, say, anonymity is applied for protecting the witness from illegal actions of the suspect, the accused, the convicted, the victim or other persons involved, then special legal protection measures are applied to ensure the witness's protection from criminal impact of whatever persons, i.e. even from officials of legal institutions. Special legal protection measures have such characteristic feature as complexity allowing their flexible and effective application. Although, be as it is, they are still insufficient. In Lithuania there is still a lack of measures for social security (support) that would be quite effective in helping the protected witnesses to implement their function in a proper manner.

Conclusions and suggestions

The results of the investigation which enhances theoretical analysis of the witness's legal status in criminal procedure and scientific evaluation of protection of the witness's procedural

interests allow formulation of conclusions as presented below and proposals both of general nature and draft amendments of the main appropriate provisions of the CPC:

1. Historical analysis of the witness's institution in Lithuania allows statements that legal position of the witness was determined by prevailing formal evidence evaluation tradition. This was influenced also by social status, the interest of the ruling classes, property status, beliefs. At the end of the 19th century and beginning of the 20th century attitude towards the witness changed because apprehension about evidences also changed. Step by step the witness started to be treated as the subject with full rights.

2. The witness's legal status in the procedure enhances his/her procedural status and social-legal role.

The witness's procedural status includes its nature, the commencement and the end of the status, its significance for protection of interests, as well as questions of other subjects of the procedure becoming as witnesses. The appearance of the status is determined by factual and legal basis. Factual basis is associated with getting acquainted with the person's factual circumstances directly or indirectly. Having got acquainted with the circumstances the person is not entitled to realize their importance for the purpose of the procedure. Knowledge of circumstances that are obviously significant for the case does not determine the statement that he knows the circumstances significant for the case but presumption that he/she may know. Legal basis is defined by the moment when the person becomes aware of his/her as a witness's rights, duties and responsibility. After procedural status ends the process of protection of the witness's interests is not interrupted. Respectively, special legal protection may be applied in respect of the witness.

The possibility foreseen by the CPC of the Republic of Lithuania to call and inquire other subjects of the procedure in the same case, i.e. the victim, the statutory representative, the official who performed pre-trial investigation or separate actions of it, is not in conformity with the idea of the nature of the witness. In the same procedure the subjects playing some definite role and acquiring one more – the witness's status (even temporarily) are not genuine, "ideal" witnesses. Therefore it should be proposed to reject the clause saying that the above mentioned subjects (except for persons who are not officials performing pre-trial investigation by virtue of parts 6 and 7 of Article 158 of the CPC) are called and interrogated as witnesses and instead establishing that they are inquired observing the rules of witnesses' interrogation.

Social-legal role of the witness is linked to his/her function, interest and indispensability. The witness's function – help to establish the truth in the case. The witness's role is not just subsidiary in the procedure. Abrupt affirmation that the witness has no legal interest in the procedure and cannot have one is impossible. The witness is always concerned at least in his/her own legal status.

3. The purpose of the witness's procedural interests – ensure implementation of the witness's function. Protection of interests enhances their assurance prior to commencement of the criminal procedure, during it and after it is accomplished. It includes procedural legal and special legal (non procedural) measures. Procedural legal measures are connected with regulation and implementation of the witness's rights as well as anonymity and assurance of additional guarantees.

The right of the witness to be informed about rights and duties granted to him/her are sometimes violated because of improper regulation. The witness has to be informed appropriately about his rights and duties, with proper explanation of their contents. The right to legal assistance should be also foreseen which would be rendered via the representative under power of attorney. The witness's right to appeal against actions and decisions taken by the subjects of the procedure insofar as it concerns the witness's interests has been unjustifiably restricted. Incorporation in the CPC of the right to raise an objection to the interpreter would also contribute to the protection of the witness's interests. Therefore it is suggested to evaluate the possibility to include in Article 81 the witness's right of request to be informed about the witness's rights and duties as well as his/her right to legal assistance, the right of appeal against procedural actions and decisions (rulings and judgments) taken by pre-trial investigation official, the prosecutor and pre-trial investigation judge and the witness's right to raise an objection to the interpreter. Respectively, amendments of other provisions should also take place within the CPC.

Anonymity of the witness is based only on the model of absolute secrecy of the person's identity data, although relative secrecy model should also be established, i.e. classification of certain identity data only. The CPC provision that only the witness himself/herself may refer with the request concerning application of anonymity is not sufficient. Besides, while implementing this institution the jeopardy towards the protection effectiveness may also appear because of formal reason, disregarding the fact that threat to the witness's interests has not been actually extinguished. Therefore it is proposed to discuss the possibility to modify the institution of anonymity dividing it into absolute and relative. Once some of formal backgrounds of anonymity extinguish but information is obtained that threat to the witness still exists it should be possible to transfer from absolute to relative anonymity.

Additional guarantees (immunities) of the witness's procedural interests safeguard personal and objective interests (in the case of the President of the Republic of Lithuania – his legal position as state politician's).

The right not give evidence against oneself attests the person's right to decide to behave in one or another way when it concerns possibility to be convicted. The analysis of this immunity makes us doubt about usability of provisions of point 1, Article 80 of the CPC. It should be evaluated in the same way as part 2 of Article 82 of the CPC about the incorporated immunity of

family members and close relatives because it concerns personal secrets. It should be based not only on family ties but also on categories of living together, stability and flexibility of relationship, mutual liabilities, common children, etc. of close persons. Judges' immunity in the sense of point 2 of Article 80 of the CPC is absolute because the decision in the case is taken in the name of the state. This immunity could be talked about only then when the judge does not abuse his/her legal status. Prohibition to inquire the defender and the representative about what they have learnt while performing their duties is not absolute. Difficulties arise also because the CPC and other legal acts do not regulate identically immunity of attorneys-at-law from their duty to give evidence about what they have learnt while performing their duties. The priest needs absolute immunity not for his own protection but people's right to the liberty of beliefs. The concept of clergymen should not be explained in an extensive manner, otherwise in respect of the man who considers himself/herself as a priest (for example, a monk) but is not acknowledged as one according to laws of the Catholic church, provisions of point 4 of Article 80 of the CPC should be applied. The journalist's relative immunity is determined by the interest of the media representatives to keep secrecy of the information source and in such a way to assure society's trust in mass media. The basis allowing to take the decision to disclose the secret of the information source is overvalued. The President of the Republic has the witness's immunity only as a politician of the state. It is considered that the President of the Republic, irrespective of the nature of the immunity he possesses, while being a witness should feel obligation to assist in establishing the truth in the case. The guarantee established by part 1 of Article 82 of the CPC should serve only then when the President's participation in the case would hinder proper fulfillment of the state head's duties.

Special legal protection is wider than procedural. Here it is important if the protected person shall be, is or has been in the case as a witness. The existing protection is not optimal, because legal acts first of all underline formal protection application basis extinguishment of which means that the witness remains unprotected although threat towards him/her has not actually disappeared. Besides, some of the bases are especially valued. Besides the totality of protection measures there is a lack of protection measures of social nature. Psychological assistance, employment assistance, financial assistance, life and health insurance would enable to seek more effectively a more active participation in the procedure of the witness and close people of the witness. Moreover legal acts do not prescribe for protection of the witnesses who are imprisoned against possibility of criminal impact. Therefore it is proposed to incorporate socially oriented protection measures in legal acts as well.

These conclusions substantiate the hypothesis raised and allow draft formulation and suggestions of the main modifications and amendments for some provisions of the CPC:

1. It is proposed to modify Article 78 of the CPC and establish the following formulation:

„As a witness any person may receive subpoena about whom there exist data that he or she may know any circumstances that could be significant for investigation and resolution of the case“.

2. It is proposed to change Article 45 of the CPC to the following wording:

„The judge, the prosecutor and pre-trial investigation official must explain to persons involved in the procedure their procedural rights and to guarantee possibility to make use of them“.

3. It is proposed to perform modification of point 1 of Article 81 of the CPC and to lay it down in the following way:

„1) give testimony in your own mother tongue or in other language which he/she masters and make use of interpreter's services when interrogation is carried out in unfamiliar language to the witness;“.

4. It is proposed to incorporate the immunity, as a personal guarantee, from the duty to give evidences about criminal acts performed by oneself under part 2 of Article 82 of the CPC which defines the immunity of the family members or close relatives when they are witnesses. Respectively, it is proposed to modify part 2 of Article 82 of the CPC and set forth the following wording:

„2. The person who can testify about criminal acts performed by himself/herself, as well as family members or close relatives of the suspect or the accused have the right not to give evidences and not to respond to certain questions given to them. The right not to give evidences or not to respond to certain questions may be exercised by the person with whom the suspect or the accused has made an agreement for marriage or former spouse of the suspect or the accused.“

Altogether modifications to Articles 80 and 82 should take place.

5. It is proposed to modify point 3 of Article 80 of the CPC in such a manner:

„3) the defender of the suspect, the accused, the acquitted or the convicted, representatives of the victim, the plaintiff and the respondent – concerning circumstances that they learnt while fulfilling the duties of a defender or a representative, except for the cases when the suspect, the accused, the acquitted or the convicted allows the defender and the victim, the plaintiff, the respondent allow the representative to disclose certain information“.

Also it is proposed to modify part 1 of Article 46 of the Bar of the Republic of Lithuania in the following manner:

„Attorney-at-law cannot be interrogated as a witness or submit explanations about circumstances which he/she learnt while performing his/her professional duties, except for the cases when the client permits to disclose certain information.“

In addition, it is proposed to amend part 1 of Article 61 of the CPC to the following wording:

„1. Attorney-at-law or his/her assistant has no right to participate in the procedure as a defender or the representative of the victim, the plaintiff or the respondent if he/she in the same case provides or previously provided legal assistance to the person whose interest contradicts to the interests of the person who asks for legal assistance or he/she previously participated as the judge, the prosecutor, pre-trial official, expert, specialist, interpreter or was interrogated in the same case earlier as a witness, including cases when the attorney-at-law and his/her assistant have kinship with an official who is involved in investigation or examination of the case."

6. It is proposed to modify point 5 of Article 80 of the CPC establishing the following formulation:

„5) public information organizers, distributors, owners of public information organizers and (or) distributors, journalists – concerning the basis of secrecy of information source as it is described in mass media law of the Republic of Lithuania, when these persons agree to give evidences themselves or court decision has been made on the necessity to disclose the secret of information source in case it is needed for protection of the society's interests and the circumstances are sufficiently important and serious".

7. It is proposed to amend part 1 of Article 182 of the CPC in the following way:

„1. A person is called for interrogation by subpoena. It indicates the following: who and for what reason is called, where and to whom to appear, date and hour of arrival, rights, duties and responsibility of the witness foreseen in Articles 81 and 83 of this Code as well as consequences of non arrival as foreseen by Article 163 of this Code".

8. It is proposed to amend part 1 of Article 277 of the CPC and to set down the following formulation:

„1. Prior to the witness's testimony the chairperson of the trial establishes the witness's identity also the absence of the circumstances hindering swearing of an oath, then the chairperson explains to the witness his/her rights, civil obligation and duty as they are foreseen in Article 81 of the Code to tell the truth about everything he/she knows in connection to the case and warns about responsibility according to Article 163 of the Code for disagreement or avoidance to give evidences and about liability by virtue of Article 235 of the Republic of Lithuania for giving untruthful evidences".

9. It is proposed to supplement Article 198 of the CPC with a new part 3:

„3. The prosecutor or pre-trial investigation official having obtained data that the basis for application of anonymity to the victim and the witness foreseen in Article 199 of the Code exist but there is no request neither from the victim nor the witness to apply anonymity, may take a motivated decision to apply anonymity".

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LIUDYTOJO PROCESINIŲ INTERESŲ APSAUGA BAUDŽIAMAJAME PROCESE: PROBLEMOS IR PERSPEKTYVOS

Santrauka

Tiriamoji problema. Tiriamoji problema apima du aspektus: pirma, – tai liudytojo teisinės padėties suvokimą ir, antra, – procesinių liudytojo interesų apsaugą. Paprastai teigiama, kad kaip liudytojas byloje yra tas, kuris žino tam tikras aplinkybes, galinčias vėliau būti reikšmingas atskleidžiant nusikalstamą veiką. Liudytoju gali būti bet kas, be to, jis procese negali būti suinteresuotas. Visi šie teiginiai be gilesnės jų analizės, atrodytų, yra teisingi. Tačiau taip nėra. Ne kiekvienas asmuo, apie kurį yra duomenų, kad jis žino bylai galinčias būti reikšmingas aplinkybes, iš tiesų tai žino, ne kiekvienas asmuo, kuris tikrai žino bylai galimai reikšmingas aplinkybes, gali būti pripažįstamas liudytoju, be to, neteisinga vienareikšmiškai teigti, kad kaip liudytojas byloje apklausiamas asmuo neturi jokio teisinio intereso byloje. Taigi, visi šie teisinės liudytojo padėties klausimai teisės doktrinoje yra probleminiai, nes moksline prasme jie nebuvo giliau analizuojami, dėl ko teisinė liudytojo samprata ne visuomet aiškinama teisingai. Kalbant apie procesinių liudytojo interesų apsaugą baudžiamojoje byloje, pažymėtina, kad ši apsauga yra labai svarbus įnašas į baudžiamąją justiciją, nes ji ne tik sužadina visuomenę padėti atskleisti nusikalstamas veikas apskritai, bet ir turi įtakos siekiant greitai ir išsamiai nustatyti tiesą konkrečioje byloje. Deja, tačiau praktinėje teisėsaugos institucijų, teismų veikloje ne visuomet taip yra. Problema ta, jog, nežiūrint to, kad įstatymuose yra įtvirtintos kai kurios liudytojo procesinių interesų apsaugos garantijos, tačiau praktikoje jos nėra realizuojamos taip, kaip turėtų būti. Kai kurios interesų užtikrinimo garantijos apskritai netinkamai aiškinamos arba neteisingai reglamentuojamos, kas neigiamai atsiliepia įgyvendinant liudytojo procesinių interesų apsaugos priemonių mechanizmą.

Mokslo darbo temos aktualumas ir problematika. Lietuvos Respublikos Konstitucija saugo ir gina asmens teises bei interesus. Jos paskirtis turi būti įgyvendinama be jokios diskriminacijos, nesukuriant jokių sąlygų socialinei atskirčiai atsirasti. Tai detalizuoja ir Lietuvos Respublikos baudžiamojo proceso kodeksas (toliau - BPK), kurio 1 str. įvardinta baudžiamojo proceso paskirtis susijusi su žmogaus ir piliečio interesų gynyba procesinės veiklos metu. Iš to seka, kad tiriant ir nagrinėjant nusikalstamas veikas negali būti pamiršti ar ignoruojami į šį procesą patenkantys asmenys, turintys šiame procese vienokį ar kitokį interesą. Šių asmenų ratui priklauso ir liudytojas, kuris užgimsta kartu su nusikalstamos veikos aplinkybėmis. Deja, tačiau tiek teorijoje, tiek ir praktikoje šio subjekto teisinė padėtis bei vaidmuo dažnai yra ne tai kad sumenkinama, bet tiesiog nesąmoningai pamirštama. Paprastai manoma, kad liudytojo vaidmuo procese prasideda ir

baigiasi parodymų davimu ikiteisminio tyrimo, teisminio nagrinėjimo stadijose ir kt. Be to, neretai teigiama, kad šis proceso subjektas neturi jokio intereso byloje, jo vaidmuo yra fragmentinis, pagalbinis. Galiausiai apskritai šio subjekto misija procese paprastai pastatoma į antrą planą nepagalvojant, kad nemažoje dalyje bylų liudytojo parodymų reikšmė yra itin reikšminga ar net lemianti.

Liudytojo procesinių interesų apsaugos ir užtikrinimo baudžiamajame procese klausimas aktualus dėl vienintelės, tačiau itin svarbios, priežasties - jeigu procesinės veiklos metu nebus apsaugoti procesiniai liudytojo interesai, jeigu nebus paisoma šio subjekto, kaip žmogaus, poreikių, dažnai susijusių su saugia būtimi, siekiu išvengti nežinomybės, noru būti reikalingu ar rūpimu, tuomet galima pamiršti apie liudytojo tikrąją pagalbą įgyvendinant baudžiamojo proceso paskirtį. Būtina suprasti, kad valstybė, neišskirdama liudytojo, padedančio byloje nustatyti tiesą, interesų apsaugos klausimo, kaip vieno iš prioritetinių, pastato save į pavojų, jog baudžiamasis procesas dėl konkrečios nusikalstamos veikos taip gali ir nepasiekti tiesos apogėjaus.

Tyrimo objektas - tai liudytojo teisinė padėtis baudžiamajame procese, liudytojo instituto istorinė raida, jo teisinė prigimtis, procesinio statuso klausimai. Ne mažiau svarbi tyrimo objekto dalis yra ir liudytojo procesinių interesų apsaugos tema, apimanti apsaugos paskirties, apsaugos priemonių sistemos, šių priemonių mechanizmo klausimus. Tyrimo objekto konstrukcija suponuoja ir paties tyrimo linkmę, t. y. pirmiausia, liudytojo teisinės padėties baudžiamajame procese teorinių pagrindų ir, antra, liudytojo procesinių interesų apsaugos analizę.

Tyrimo tikslas - kompleksiškai išanalizuoti liudytojo teisinės padėties baudžiamajame procese teorinius pagrindus, turinčius įtakos šio subjekto procesinių interesų apsaugai, šios apsaugos sampratą, įvertinti kiek ir kaip šiuos klausimus atspindi BPK bei kitų teisės aktų nuostatos ir teismų praktika, taip pat nustatyti teisinio reguliavimo ir praktinio teisės normų įgyvendinimo trūkumus, siūlyti identifikuotų trūkumų pašalinimo, kitų nuostatų optimizavimo būdus.

Tyrimo uždaviniai. Darbo tikslui pasiekti keliami šie uždaviniai: aptarti liudytojo instituto Lietuvos baudžiamajame procese istorinės raidos aspektus, rodančius liudytojo teisinės prigimties formavimąsi bei sampratą skirtingais istoriniais laikotarpiais, kaip kito požiūris į liudytoją, kaip proceso subjektą ir kaip į asmenį, kokia buvo jo vaidmens reikšmė skirtingais laikotarpiais priklausomai nuo socialinių, ekonominių, politinių ir, žinoma, teisinių faktorių; ištirti liudytojo procesinį statusą, šio statuso pradžios, pabaigos momentus, jų įtaką liudytojo interesų tinkamai apsaugai, taip pat tapsmo liudytoju kriterijus ir sąlygas; atskleisti ir aptarti liudytojo socialinio-teisinio vaidmens turinį, apimantį liudytojo funkciją ir interesą, aptarti jų įtaką liudytojo teisinės padėties baudžiamajame procese užtikrinimui; aptarti liudytojo procesinių interesų apsaugos paskirties, apsaugos priemonių sistemos ir mechanizmo sampratą, ištirti šios apsaugos įgyvendinimo privalumus ir nustatyti trūkumus; nustatyti procesinių liudytojo interesų apsaugos

priemonių, t. y. kai kurių jo teisių, papildomų garantijų (imunitetų) teisinio reguliavimo ir praktinio įgyvendinimo sunkumus bei trūkumus, apibrėžti šių sunkumų ir trūkumų pašalinimo būdus ir galimybes; nustatyti specialiosios teisinės liudytojo interesų apsaugos priemonių teisinio reguliavimo ir praktinio įgyvendinimo silpnąsias vietas, ieškoti, atskleisti ir apibrėžti šių silpnybių priežastis, siūlyti optimizavimo ir tobulinimo būdus.

Darbo mokslinis naujumas. Nūdienos baudžiamojo proceso teisės teorijoje ir, be abejo, praktikoje, juntama mokslinės analizės stoka. Lietuvoje nebuvo atlikta konkrečių mokslinių tyrimų, skirtų liudytojo apsaugai analizuoti. Nežiūrint to, jog šiai dienai esama kai kurių mokslinių publikacijų šia tema, tačiau gilesnės ir išsamesnės analizės kol kas nebuvo atlikta. Tiesa, negalima pamiršti to, jog atskiruose mokslo darbuose ar praktinėje literatūroje yra fragmentiškai nagrinėjami liudytojo apsaugos klausimai, tačiau arba jų nepakanka teorinėms ir praktinėms problemoms tinkamai išspręsti, arba kai kurie išanalizuoti aspektai jau nebe tokie aktualūs. Žiūrint į teismų patirtį šiuo klausimu vertėtų pabrėžti, kad nors ir atskiruose teismų sprendimuose yra aptariami liudytojo sampratos, jo teisinės padėties užtikrinimo klausimai, tačiau to nepakanka siekiant išsamiai atskleisti liudytojo procesinių interesų apsaugos esmę, apsaugos priemonių mechanizmą Lietuvoje.

Darbo mokslinį naujumą sąlygoja tai, kad: pirma, liudytojo samprata bene pirmą kartą atskleidžiama apžvelgiant istorines šio klausimo vystimosi tendencijas; antra, liudytojo teisinės padėties baudžiamajame procese analizė atliekama konstruojant naują požiūrį į tai, kas yra liudytojas, kokia jo socialinė-teisinė prigimtis, jo paskirtis teisiniame, socialiniame ir filosofiniame kontekste; trečia, tyrime analizuojamas liudytojo procesinių interesų apsaugos reikalingumas, šios apsaugos priemonių teisinio reguliavimo metodų tinkamumas ir, ketvirta, tyrime atskleidžiami efektyvios apsaugos modelio (mechanizmo) požymiai, tokio modelio siekis ir įgyvendinimo Lietuvoje galimybės.

Tyrimo reikšmė. Disertacinio tyrimo reikšmė tiesiogiai susijusi su darbo temos aktualumu.

Darbas reikšmingas dėl keleto priežasčių. Pirma, tyrimas ir jo rezultatai yra svarbūs baudžiamojo proceso mokslo lobyno formavimui. Tyrime atlikta analizė, formuluojami teiginiai, išvados bei siūlymai esmingai prisideda prie atskirų baudžiamojo proceso teisės institutų sampratos formavimo, žmogaus teisių apsaugos koncepcijos Lietuvoje kūrimo, o galiausiai ir teisingo įstatyminių nuostatų suvokimo, vertinimo ir taikymo. Antra, šis tyrimas padeda suvokti, jog žmogaus ir valstybės santykiai bet kuriame teisiniame procese turi būti grindžiami ne deklaratyvia, o tikra ir gyvybinga pagalba vienas kitam, socialinių bei teisinių vertybių mainais užuot tik vertus ar reikalavus iš žmogaus (proceso subjekto) tik jo pareigų vykdymo pamirštant žmogaus konstitucinius interesus. Ir trečia, tyrimo rezultatai svarbūs praktinei teisėsaugos institucijų veiklai

taikant ir įgyvendinant BPK bei kitų teisės aktų nuostatas, aiškinant šių nuostatų tikrąją prigimtį ir esmę.

Tyrimo hipotezė. BPK ir kituose teisės aktuose numatytos liudytojo interesų apsaugos priemonės nėra pakankamos jo interesų apsaugos įgyvendinimui. Esamų apsaugos priemonių praktinis taikymas taip pat kartais nebūna veiksmingas.

Atliktas tyrimas ir suformuluotos išvados pagrindžia šiuos teiginius:

Liudytojo procesinį statusą asmuo įgyja nuo tada, kai jam tampa žinomos jo, kaip liudytojo, teisės, pareigos ir atsakomybė.

Kitų proceso subjektų (nukentėjusiojo, įstatyminio atstovo, ikiteisminį tyrimą ar atskirus jo veiksmus atlikusio pareigūno) apklausa toje pačioje byloje kaip liudytojo, sudvejinant iš esmės skirtingus procesinius vaidmenis, neatitinka liudytojo teisinės prigimties.

Liudytojo funkcija baudžiamajame procese - padėti nustatyti tiesą byloje. Jo vaidmuo procese nėra pagalbinis.

Baudžiamajame procese liudytojas paprastai yra suinteresuotas (bent savo teisine padėtimi), skiriasi tik šio suinteresuotumo pobūdis.

Kai kurių liudytojo interesų apsaugos reglamentavimas įstatyme nėra tinkamas. BPK turi būti tiesiogiai įtvirtinta liudytojo teisė būti informuotam apie jam suteiktas teises bei pareigas, teisė į teisinę pagalbą, teisė apskųsti procesą vykdančių subjektų atitinkamus veiksmus ir sprendimus bei teisė pareikšti nušalinimą vertėjui.

BPK įtvirtintas absoliutus liudytojo anonimiškumo modelis nėra pakankamas tinkamai liudytojo interesų apsaugai. Būtinas ir santykinis (ribotas) anonimiškumas.

Kai kurios liudytojo procesinių interesų užtikrinimo papildomos garantijos (imunitetai) įstatyme apibrėžtos netinkamai, kas sąlygoja ir ne visuomet teisingą jų praktinį įgyvendinimą.

Specialioji teisinė liudytojo apsauga taptų veiksmingesnė, jeigu įstatymuose būtų įtvirtintos ir socialiai orientuotos liudytojo apsaugos priemonės.

Mokslo darbo pagrindiniai šaltiniai. Šio mokslo darbo pagrindiniai šaltiniai yra Lietuvos ir kai kurių užsienio valstybių (Armėnijos, Bulgarijos, Bosnijos ir Hercegovinos, Čekijos, Estijos, Italijos, Indijos, Juodkalnijos, Jungtinių Amerikos Valstijų, Kazachstano, Latvijos, Makedonijos, Norvegijos, Prancūzijos, Rusijos, Suomijos, Švedijos, Tailando, Vokietijos) baudžiamojo proceso įstatymai (kodeksai) bei kiti teisės aktai, reglamentuojantys liudytojų apsaugos įgyvendinimą, Lietuvos, Europos Žmogaus Teisių Teismo, Europos Bendrijų Teisingumo Teismo ir kitų užsienio šalių teismų praktika, Europos Sąjungos teisės aktai, tarptautinės sutartys ir rekomendacijos, teisės teorijos, baudžiamojo proceso, baudžiamosios teisės, kriminalistikos, civilinės teisės, civilinio proceso, psichologijos mokslų literatūra, statistikos duomenys.

Mokslo darbe panaudoti metodai. Mokslo darbe daugiausia remtasi šiais metodais: sisteminės analizės, abstrakcijos, apibendrinimo, genetiniu, lyginamuoju istoriniu, lyginimo, dokumentų analizės metodais. Šių metodų kompleksinis taikymas turi didelę reikšmę tyrimo metu gautų apibendrinimų, išvadų teisingumui ir patikimumui, taip pat suformuluotų siūlymų pagrįstumui.

Tyrimo rezultatų aprobavimas. Tyrimo rezultatai aprobuoti Mykolo Romerio universiteto Teisės fakulteto Baudžiamojo proceso katedros posėdyje. Jie atitinkamai naudojami dėstant baudžiamojo proceso teisės kursą teisės studijų studentams. Gauti rezultatai panaudoti teikiant pastabas ar siūlymus įstatymų leidėjui, kitoms valstybės institucijoms, formuojančioms baudžiamąją justiciją.

Darbo struktūra. Darbo struktūrą ir jo visumą lemia tyrimo objektas, suformuluotas tikslas ir šiam tikslui pasiekti iškelti uždaviniai. Disertacinį tyrimą sudaro įvadas, tyrimų apžvalga, mokslinio tyrimo metodologija, dvi dėstomosios-tiriamosios dalys, išvados, pasiūlymai, literatūros sąrašas ir priedas.

Disertacijos *įvade* pristatoma tiriamoji problema, apibrėžiamas darbo temos aktualumas ir darbo naujumas, tikslas bei jam keliami uždaviniai, pateikiami ginamieji disertacijos teiginiai.

Pirmoje dalyje analizuojami liudytojo teisinės padėties baudžiamajame procese pagrindai. Liudytojo instituto Lietuvos baudžiamajame procese istorinės raidos apžvalga yra pirmasis žingsnis, įvedantis į tyrimo aktualijas. Šio instituto apžvalgos istoriniame Lietuvos teisės vystimosi bėgyje rezultatai padeda nuosekliau gilintis ir analizuoti liudytojo teisinę padėtį šiuolaikiniame baudžiamajame procese, atskleisti liudytojo sampratos prigimtį, jo vaidmenį teisiniame procese. Pirmoje dalyje taip pat tiriami ir analizuojami tokie svarbūs klausimai kaip liudytojo procesinis statusas, liudytojo funkcija procese, jo interesai.

Liudytojo procesinio statuso klausimai susiję su jo pradžios ir pabaigos momentais, jų reikšme liudytojo procesinių interesų apsaugai. Procesinio statuso atsiradimas visuomet sietinas su faktiniais ir juridiniais pagrindais, taip pat su procesinio subjektiškumo esme. Konstatuojama, kad *kaip liudytojas gali būti šaukiamas bet kuris asmuo, apie kurį yra duomenų, kad jis gali žinoti kokių nors reikšmės bylai išspręsti turinčių aplinkybių ir ne būtinai turi suvokti šių aplinkybių prasmę bei jų svarbą baudžiamojo proceso paskirčiai*.

Disertacijoje sutinkama, kad kai kurių proceso subjektų tapsmo liudytojais leistinumo problema aktuali ne tik teorijoje, bet ir praktikoje. Liudytojo teisinės padėties tinkamas suvokimas leidžia ne tik išgryninti jo socialinį-teisinį vaidmenį, bet ir praktinėje veikloje atriboti „nepriklausomą“ liudytoją nuo liudytojo, susijusio su bylos baigtimi. Taigi, nukentėjusiojo, įstatyminio atstovo ar ikiteisminį tyrimą, ar atskirus tyrimo veiksmus atlikusio pareigūno apklausa turi būti atliekama ne kaip liudytojo, bet laikantis liudytojo apklausos taisyklių.

Liudytojo teisių ir pareigų įgyvendinimas tiesiogiai lemia jo funkcijos-vaidmens juridinį apibrėžtumą. Jo teisių ir pareigų visetas laikytinas ne tik liudytojo vaidmens palaikančiuoju instrumentarijumi, bet tuo pat metu liudytojo funkcijai suteikia vertybinę kryptį, vietą bei siektiną tikslą. Tuo tarpu siektino tikslo nustatymas savaime nubrėžia funkcijos-vaidmens kryptį, jos prasmę. Liudytojo funkcijos kryptingumas parodo jos tikslą, kaip konkretizuojamą ketinimą savo parodymais valingai ir nuoširdžiai padėti baudžiamąjį procesą vykdantiems subjektams įgyvendinti proceso paskirtį. Tai yra padėjimas byloje nustatyti tiesą.

Liudytojo intereso byloje analizė leidžia teigti, kad liudytojo procesiniai interesai baudžiamajame procese gali būti skirstomi į suinteresuotumą bylos baigtimi ir suinteresuotumą savo teisine padėtimi konkrečioje baudžiamojoje byloje. Paprastai liudytojas yra suinteresuotas savo teisine padėtimi baudžiamojoje byloje.

Šioje dalyje konstruojami išgryninti liudytojo sąvokos požymiai.

Antra dalis skirta analizuoti liudytojo procesinių interesų apsaugos bendruosius aspektus ir probleminius klausimus. Visa tai leido analizuoti liudytojo procesinių teisių, jo papildomų garantijų baudžiamajame procese, specialiųjų teisinių apsaugos priemonių turinį ir įgyvendinimo aktualijas.

Liudytojo procesinių interesų apsauga apima procesines ir specialiąsias teisines apsaugos priemones. Procesinės apsaugos priemonės taikomos tik baudžiamojo proceso metu. Tai yra liudytojo procesinės teisės ir jų užtikrinimas, liudytojo papildomų garantijų (imunitetų) taikymas bei liudytojo anonimiškumas. Atkreiptinas dėmesys, kad šiuo metu BPK numatytos liudytojo procesinės teisės nėra pakankamos tinkamam liudytojo teisinės padėties užtikrinimui. Šalia jų turėtų būti numatytos dar kitos, o būtent, teisė būti informuotam apie turimas teises ir pareigas, teisė į teisinę pagalbą, teisė apskųsti atitinkamus veiksmus ar sprendimus, teisė pareikšti nušalinimą vertėjui.

Papildomų liudytojo garantijų (imunitetų) vaidmuo baudžiamajame procese yra labai svarbus. Šie imunitetai padeda apsaugoti kai kuriuos liudytojo asmeninius bei dalykinius interesus (paslaptis). Liudytojo papildomų garantijų esmė yra tai, jog šios procesinės apsaugos priemonės užtikrina kai kurių liudytojo asmeninių (šeiminių) ar dalykinių (profesinių) paslapčių apsaugą. Asmeniniai imunitetai užtikrina asmens teisės laisvai apsispręsti duoti prieš save parodymus ar ne, taip pat šeimos narių, artimųjų giminaičių ar kitų įtariamajam ar kaltinamajam artimų žmonių teisės laisvai apsispręsti ar duoti parodymus prieš savo artimą ar ne įgyvendinimą. Tuo tarpu dalykiniai imunitetai atitinkamiems asmenims, dalyvaujantiems byloje kaip liudytojais, leidžia netrukdomai toliau vykdyti savo dalykines (profesines) funkcijas.

Liudytojo anonimiškumo įgyvendinimo analizė rodo, kad šis institutas Lietuvos baudžiamajame procese nėra optimalus. Šiuo metu BPK yra įtvirtintas absoliutus anonimiškumo

modelis, kai tuo tarpu tinkamai liudytojo procesinių interesų apsaugai būtinas ir santykinis anonimiškumas.

Prie liudytojo procesinių interesų apsaugos priemonių priskirtinos ir specialiosios teisinės (neprocesinės) priemonės. Šios priemonės savo apimtimi yra ženkliai platesnės nei procesinės apsaugos priemonės, kadangi jos gali būti taikomos tiek dar neprasidėjus baudžiamajam procesui, tiek jam vykstant, tiek ir jam pasibaigus. Specialiosioms teisinėms apsaugos priemonėms būdingas kompleksiškumas, leidžiantis jas taikyti lanksčiai ir efektyviai. Tačiau, kaip bebūtų, jos taip pat nėra pakankamos. Lietuvoje trūksta socialinio pobūdžio apsaugos (paramos) priemonių, galinčių gana veiksmingai padėti apsaugomiems liudytojams tinkamai įgyvendinti savo funkciją.

Išvados ir pasiūlymai:

1. Istoriškai liudytojo teisinę padėtį labiausiai sąlygojo vyravusi formalaus įrodymų vertinimo tradicija. Tai lėmė ir socialinis luomas, valdančiųjų interesas, turtinė padėtis, tikėjimas. XX amžiaus bėgyje į liudytoją pradėta žiūrėti kaip į visateisį proceso subjektą.

2. Liudytojo teisinė padėtis apima jo procesinį statusą ir socialinį-teisinį vaidmenį.

2.1. Liudytojo procesinis statusas apima jo prigimtį, statuso pradžią ir pabaigą, reikšmę interesų apsaugai, taip pat kitų proceso subjektų tapsmo liudytojais klausimus. Statuso atsiradimą lemia faktiniai bei juridiniai pagrindai. Faktinis pagrindas siejamas su asmens faktinių aplinkybių pažinimu tiesiogiai arba netiesiogiai. Juridinį pagrindą lemia momentas, kuomet asmeniui tampa žinomos jo, kaip liudytojo, teisės, pareigos ir atsakomybė. Pasibaigus procesiniam statusui, liudytojo interesų apsaugos procesas nenutrūksta.

2.2. Lietuvos BPK numatyta galimybė kaip liudytojus toje pačioje byloje šaukti ir apklausti kitus proceso subjektus, t. y. nukentėjusįjį, įstatyminį atstovą ir ikiteisminį tyrimą ar atskirus jo veiksmus atlikusį pareigūną, nedera su liudytojo prigimties idėja. Todėl siūlytina BPK atsisakyti nuostatos, kad pirmiau minėti subjektai šaukiami ir apklausiami kaip liudytojai vietoj to nustatant, kad jie apklausiami laikantis liudytojo apklausos taisyklių.

2.3. Socialinis-teisinis liudytojo vaidmuo siejamas su jo funkcija, interesais ir nepakeičiamumu. Liudytojo funkcija – padėjimas byloje nustatyti tiesą. Liudytojas taip pat paprastai yra suinteresuotas bent savo teisine padėtimi.

3. Liudytojo procesinių interesų apsauga apima procesines teisines ir specialiąsias teisines (neprocesinės) priemones.

3.1. Procesinės teisinės priemonės susijusios su liudytojo teisių reglamentavimu bei įgyvendinimu, anonimiškumo bei papildomų garantijų užtikrinimu. Liudytojo teisė būti informuotam apie jam suteiktas teises bei pareigas neretai pažeidžiama. Turi būti numatyta jo teisė ir į teisinę pagalbą. Jo teisė apskųsti procesą vykdančių subjektų veiksmus bei sprendimus kiek tai susiję su jo interesais yra be pagrindo apribota. Teisės pareikšti nušalinimą vertėjui įtvirtinimas

BPK taip pat prisidėtų prie liudytojo interesų apsaugos. Todėl siūlytina įvertinti galimybę BPK 81 str. numatyti pirmiau išvardintas liudytojo teises. Liudytojų anonimiškumo reglamentavimas nėra optimalus, nes jis paremtas absoliutaus įslaptinimo modeliu, tačiau turėtų būti nustatytas ir santykinis. Siūlytina tobulinti šį institutą.

Papildomos liudytojo procesinių interesų garantijos (imunitetai) apsaugo asmeninius ir dalykinius interesus. Teisė neduoti prieš save parodymų liudija apie asmens teisę į apsisprendimą elgtis vienaip ar kitaip, jei tai susiję su jo įkaltinimo galimybe. Teisėjų imunitetas yra absoliutus, nes sprendimas byloje priimamas valstybės vardu. Draudimas apklausti gynėją bei atstovą apie tai ką jie sužinojo atlikdami savo pareigas nėra absoliutus. Dvasininkui absoliutus imunitetas reikalingas siekiant apsaugoti ne save, o žmonių teisę į tikėjimo laisvę. Pagrindai, leidžiantys priimti sprendimą atskleisti žurnalisto informacijos šaltinio paslaptį, yra pernelyg vertinamieji. Liudytojo imunitetą Respublikos Prezidentas turi tik kaip valstybės politikas. Manoma, kad Respublikos Prezidentas, būdamas liudytoju, turi jausti priedermę padėti nustatyti tiesą byloje.

3.2. Specialioji teisinė apsauga yra platesnė nei procesinė. Ši apsauga nėra optimali, nes teisės aktuose pirmiausia pabrėžiami formalieji apsaugos taikymo pagrindai. Be to, kai kurie pagrindai yra itin vertinamieji. Šalia apsaugos priemonių visumos pasigendama ir socialinio pobūdžio priemonių. Todėl siūlytina įtvirtinti ir socialiai orientuotas apsaugos priemones.

Šios išvados bei kai kurie bendresni siūlymai leidžia formuluoti ir siūlyti svarbiausius atitinkamų BPK nuostatų pakeitimų ar papildymų projektus:

1. Siūlytina pakeisti BPK 78 str. ir jį išdėstyti taip:

„*Kaip liudytojas gali būti šaukiamas bet kuris asmuo, apie kurį yra duomenų, kad jis gali žinoti kokių nors reikšmės bylai ištirti ir išspręsti turinčių aplinkybių.*“

2. Siūlytina pakeisti BPK 45 str. ir jį išdėstyti taip:

„*Teisėjas, prokuroras ir ikiteisminio tyrimo pareigūnas privalo išaiškinti procese dalyvaujantiems asmenims jų procesines teises ir užtikrinti galimybę jomis pasinaudoti*.“

3. Siūlytina pakeisti BPK 81 str. 1 p. ir jį išdėstyti taip:

„*1) duoti parodymus savo gimtąja kalba arba kita kalba, kurią jis moka ir naudotis vertėjo paslaugomis, jei apklausa vyksta jam nesuprantama kalba*;“.

4. Siūlytina liudytojo imunitetą nuo pareigos duoti parodymus apie jo paties padarytą nusikalstamą veiką, kaip asmeninę garantiją, inkorporuoti į BPK 82 str. 2 d., apibrėžiančią šeimos narių ar artimųjų giminaičių, kaip liudytojų, imunitetą. Atitinkamai siūlytina pakeisti BPK 82 str. 2 d. ir ją išdėstyti taip:

„*2. Asmuo, kuris gali duoti parodymus apie savo paties padarytą nusikalstamą veiką, taip pat įtariamojo ir kaltinamojo šeimos nariai ar artimieji giminaičiai turi teisę neduoti parodymų arba neatsakyti į kai kuriuos pateiktus klausimus. Teise neduoti parodymų arba neatsakyti į kai*

kuriuos pateiktus klausimus gali pasinaudoti asmuo, su kuriuo įtariamasis ir kaltinamasis yra susitaręs sudaryti santuoką ar įtariamojo ir kaltinamojo buvęs sutuoktinis.“ Kartu turėtų būti daromi BPK 80 ir 82 str. pakeitimai.

5. Siūlytina pakeisti BPK 80 str. 3 p. ir jį išdėstyti taip:

„*3) įtariamojo, kaltinamojo, išteisintojo ar nuteistojo gynėjas, nukentėjusiojo, civilinio ieškovo, civilinio atsakovo atstovai - dėl aplinkybių, kurias jie sužinojo atlikdami gynėjo arba atstovo pareigas, išskyrus atvejus, kai įtariamasis, kaltinamasis, išteisintasis ar nuteistasis leidžia gynėjui, o nukentėjusysis, civilinis ieškovas, civilinis atsakovas leidžia atstovui atskleisti tam tikrą informaciją*“.

Taip pat siūlytina pakeisti Lietuvos Respublikos advokatūros įstatymo 46 str. 1 d. ir ją išdėstyti taip:

„*Advokatas negali būti apklausiamas kaip liudytojas ar teikti paaiškinimus dėl aplinkybių, kurias sužinojo atlikdamas savo profesines pareigas, išskyrus atvejus, kai klientas advokatui leidžia atskleisti tam tikrą informaciją*.“

Be to, siūlytina pakeisti BPK 61 str. 1 d. ir ją išdėstyti taip:

„*1. Advokatas arba advokato padėjėjas neturi teisės dalyvauti procese kaip gynėjas arba nukentėjusiojo, civilinio ieškovo ir civilinio atsakovo atstovas, jeigu jis toje pačioje byloje teikia arba anksčiau teikė teisinę pagalbą asmeniui, kurio interesai prieštarauja teisinės pagalbos prašančio asmens interesams, arba jeigu anksčiau dalyvavo kaip teisėjas, prokuroras, ikiteisminio tyrimo pareigūnas, ekspertas, specialistas, vertėjas, arba jeigu ankščiau toje pačioje byloje buvo apklaustas kaip liudytojas, taip pat jeigu tiriant arba nagrinėjant bylą dalyvauja pareigūnas, su kuriuo tas advokatas arba advokato padėjėjas turi giminystės ryšių*.“

6. Siūlytina pakeisti BPK 80 str. 5 p. ir jį išdėstyti taip:

„*5) viešosios informacijos rengėjai, platintojai, viešosios informacijos rengėjo ir (ar) platintojo savininkai, žurnalistai - dėl to, kas pagal Lietuvos Respublikos visuomenės informavimo įstatymą sudaro informacijos šaltinio paslaptį, išskyrus atvejus, kai šie asmenys patys sutinka duoti parodymus arba kai yra priimtas teismo sprendimas, kad būtina atskleisti informacijos šaltinio paslaptį jeigu to reikia visuomenės interesams apginti ir jeigu aplinkybės yra pakankamai svarbios ir rimtos*“.

7. Siūlytina pakeisti BPK 182 str. 1 d. ir ją išdėstyti taip:

„*1. Asmuo iškviečiamas į apklausą šaukimu. Jame nurodoma: kas ir dėl ko šaukiamas, kur ir pas ką atvykti, atvykimo data ir valanda, šio Kodekso 81 ir 83 straipsniuose numatytos liudytojo teisės ir pareigos, atsakomybė, taip pat šio Kodekso 163 straipsnyje numatytos neatvykimo pasekmės*“.

8. Siūlytina pakeisti BPK 277 str. 1 d. ir ją išdėstyti taip:

„*1. Prieš liudytojui duodant parodymus, teisiamojo posėdžio pirmininkas nustato jo asmens tapatybę, ar nėra aplinkybių, kliudančių duoti priesaiką, po to liudytojui išaiškina šio Kodekso 81 straipsnyje numatytas jo teises, pilietinę priedermę ir pareigą teisingai papasakoti visa, kas jam žinoma byloje, ir įspėja dėl atsakomybės pagal šio Kodekso 163 straipsnį už atsisakymą arba vengimą duoti parodymus ir dėl atsakomybės pagal Lietuvos Respublikos baudžiamojo kodekso 235 straipsnį už melagingus parodymus*“.

9. Siūlytina papildyti BPK 198 str. nauja 3 dalimi:

„*3. Prokuroras ar ikiteisminio tyrimo pareigūnas, turėdamas duomenų, kad egzistuoja šio Kodekso 199 straipsnyje numatyti anonimiškumo taikymo nukentėjusiajam ir liudytojui pagrindai, tačiau nėra gautas nukentėjusiojo ar liudytojo prašymas taikyti anonimiškumą, gali priimti motyvuotą nutarimą taikyti anonimiškumą.*“